Supreme Court, U.S.
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No. 00-1869

IN THE
# Supreme Court of the United States

RICHARD FUSARO,

*Petitioner,*

*v.*

HIALEAH HOUSING AUTHORITY,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

## BRIEF IN OPPOSITION

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## QUESTION PRESENTED

Was the Court of Appeals' decision to affirm the district court's summary judgment on the grounds that petitioner failed to present sufficient evidence to create a genuine issue of material fact as to pretext in conflict with the United States Supreme Court's decision in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 120 S. Ct. 2097 (2000), such that a compelling reason exists for this Court to exercise its discretion and issue a writ of certiorari to review this matter?

## PARTIES TO THE PROCEEDING

The parties to the proceeding are Richard Fusaro ("Fusaro") and the Hialeah Housing Authority ("Authority"). Roberto Jimenez, who was an appellant/plaintiff below, is represented by separate counsel and is expected to file a separate petition with the Court. Hugo Hernandez, an appellant/plaintiff in the proceedings below, has not participated in the filing of a petition for writ of certiorari. Maria M. Roca, an appellee/defendant below, is also not a party to these proceedings. Petitioner's description of the Authority as a "political subdivision of the City of Hialeah, Florida" is incorrect. The Authority is an independent, quasi-governmental entity created pursuant to Chapter 421, Fla. Stat.

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## STATEMENT OF JURISDICTION

On March 8, 2001, the United States Court of Appeals for the Eleventh Circuit ("Eleventh Circuit") rendered its final judgment below when it denied Fusaro's petitions for rehearing and rehearing *en banc*. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

Fusaro includes in his petition the text of the First and Fourteenth Amendments of the United States Constitution. While Fusaro includes passing references to First Amendment rights in his summary of the questions presented and statement of the case, the remainder of the petition contains no argument whatsoever regarding either of the cited constitutional provisions or their applicability in these proceedings. Accordingly, the Authority disagrees that the constitutional provisions are at issue in this petition.

## CONCISE STATEMENT OF THE CASE

The Authority terminated the employment of Fusaro for repeated and admitted instances of malfeasance and misconduct. App. A, pp. 2a-4a, 14a-15a. Fusaro filed suit, asserting a panoply of claims, including claims of age and national origin discrimination and retaliation under Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act and the Florida Civil Rights Act of 1992 ("Fusaro's Claims").[1] The district court granted final

1. Again, while Fusaro originally asserted in the district court claims of First Amendment retaliation under 42 U.S.C. § 1983, (Cont'd)

summary judgment in favor of the Authority with respect to Fusaro's Claims concluding that Fusaro had failed to present sufficient evidence to create a genuine issue of material fact as to whether the Authority's proffered non-discriminatory and non-retaliatory reasons for discharging Fusaro were pretextual. App. C, pp. 29a-33a.

On appeal, the Eleventh Circuit affirmed the district court's summary judgment. Citing to *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 120 S. Ct. 2097 (2000) and noting Fusaro's admissions regarding malfeasance and misfeasance, the Eleventh Circuit concluded that Fusaro had failed to meet his burden of coming forward with sufficient evidence which would permit the trier of fact to infer that the Authority's proffered reasons were pretextual. App. A, pp. 14a-16a. Fusaro filed a petition for rehearing and rehearing *en banc*, both of which were denied.

## REASONS FOR DENYING THE WRIT

## THE ELEVENTH CIRCUIT'S DECISION BELOW DOES NOT GIVE RISE TO A CONFLICT WITH THIS COURT'S DECISION IN *REEVES*.

This Court grants petitions for writ of certiorari only for "compelling reasons." Sup. Ct. R. 10. Generally, a petition will be granted only when the petitioner demonstrates that the ruling rendered by the court of appeals in question conflicts with relevant decisions of this Court.

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(Cont'd)
Fusaro's petition contains no argument relating to these claims. The claims are merely mentioned in passing in the preliminary sections of the petition.

Sup. Ct. R. 10(c).[2] "A petition for writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Sup. Ct. R. 10.

In this instance, the gravamen of Fusaro's argument is that the *district court's* decision was in conflict with *Reeves*.[3] Surprisingly, Fusaro does *not* argue that the Eleventh Circuit ignored or overlooked *Reeves*. Instead, he argues that the district court's analysis conflicts with *Reeves* and that the Eleventh Circuit's decision to affirm the district court's ruling is, therefore, necessarily improper. As noted below, not only did the Eleventh Circuit correctly interpret and apply *Reeves*, the district court's analysis was consistent with it as well. As a result, there is no basis for this Court to exercise its discretionary review powers.

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2. Supreme Court Rule 10 cites to other bases for granting a petition for writ of certiorari, but those bases are inapplicable under the facts of this case. Fusaro does not argue that the Eleventh Circuit's decision below conflicts with the decisions of any other Court of Appeal. In fact, Fusaro's entire argument is limited to a purported conflict with *Reeves*. While Fusaro appears to articulate a question of federal law that has not been, but should be, settled by this Court — Fusaro Petition, pp. i, iii-iv — the question is never addressed in substance as a reason for granting the writ. Finally, Fusaro does not advocate that the Eleventh Circuit's decision so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power.

3. Of course, the district court entered final summary judgment on January 11, 1999, prior to this Court's ruling in *Reeves*.

### A. *The Eleventh Circuit's Decision Below Does Not Conflict With Reeves.*

In affirming the district court's entry of final summary judgment, the Eleventh Circuit specifically relied upon *Reeves*: "To survive summary judgment, plaintiff must then present evidence to show 'the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination.' *Reeves v. Sanderson Plumbing Prods. Inc.*, 120 S. Ct. 2097, 2106 (2000)." App. A, p. 14a. The Eleventh Circuit then noted that Fusaro had *admitted* to a number of instances of malfeasance and misfeasance, which included: (1) lack of qualifications; (2) insulting a member of the Authority's Board of Commissioners; (3) violating Board policies by approving raises and rehiring an employee without consulting the Board's chairperson; (4) authorizing overtime for other employees after being specifically warned by his superior that any future authorization of overtime without the prior approval of his superior would result in termination; and (5) making numerous mistakes in the preparation of bid packages. App. A, pp. 14a-15a.

Turning its attention to the question of pretext, the Eleventh Circuit observed that Fusaro's "evidence" of pretext was limited to conclusory allegations unsupported by record evidence. *Id.* at 15a. Citing to its own precedents in *Combs v. Plantation Patterns*, 106 F.3d 1519 (11th Cir. 1997) and *Damon v. Fleming Supermarkets of Fla., Inc.*, 196 F.3d 1354 (11th Cir. 1999), the Eleventh Circuit observed that Fusaro could not establish pretext merely by personally questioning the wisdom of the Authority's reasons or disagreeing with the prudence or fairness of the Authority's policies. *Id.*

This holding is consistent with this Court's holding in *Reeves*:

> Thus, a plaintiff's prima facie case, *combined* with *sufficient evidence* to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated.
>
> This is not to say that such a showing by the plaintiff will *always* be adequate to sustain a jury's finding of liability. Certainly there will be instances where, although the plaintiff has established a prima facie case and set forth sufficient evidence to reject the defendant's explanation, no rational factfinder could conclude that the action was discriminatory. For instance, an employer would be entitled to judgment as a matter of law if the record conclusively revealed some other, nondiscriminatory reason for the employer's decision, or if the plaintiff created only a weak issue of fact as to whether the employer's reason was untrue and there was abundant and uncontroverted independent evidence that no discrimination had occurred.

*Reeves*, 530 U.S. at 148, 120 S. Ct. at 2109 (emphasis supplied in part).[4]

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4. In fact, the Eleventh Circuit's reasoning is consistent with common sense as well. If a plaintiff employee could survive summary judgment in an employment discrimination case simply by asserting his belief that the employer's proffered reason was simply unwise or unfair, then employers would be forever foreclosed from obtaining summary judgment in these types of cases.

In this instance, the Eleventh Circuit applied *Reeves* and concluded that Fusaro's admissions of malfeasance and misfeasance, when coupled with nothing more than conclusory allegations to establish pretext, warranted summary judgment in favor of the Authority. Fusaro failed to come forward with "sufficient evidence" to establish pretext. Even if his unsupported conclusory allegations were considered "evidence" of pretext, such evidence raises, at best, a "weak issue of fact" as to the Authority's motivations, particularly in the face of "abundant and uncontroverted independent evidence" — in fact, evidence admitted by Fusaro — of legitimate, nondiscriminatory reasons for Fusaro's termination.

Regardless of the district court's analysis in granting summary judgment, the Eleventh Circuit correctly interpreted and applied *Reeves* to the facts in the record and affirmed the summary judgment. As a result, the decision below does not give rise to a conflict that warrants this Court's discretionary review.

**B.** ***Even If The Proper Focus In This Petition Were On The District Court's Analysis, Rather Than On The Eleventh Circuit's, The Petition Should Still Be Denied Because The District Court's Analysis Was Consistent With Reeves.***

Fusaro's suggestion that the district court's summary judgment analysis was flawed and inconsistent with *Reeves* is simply incorrect. Even though it rendered its decision prior to *Reeves*, the district court correctly articulated the standard by which to judge the suitability of summary judgment in employment discrimination cases. The district court cited to *Tidwell v. Carter Products*, 135 F.3d 1422 (11th Cir. 1998)

for the proposition that a plaintiff "must provide a prima facie case *plus* evidence discrediting the employer's reasons to survive a motion for summary judgment." App. C, p. 30a. This ruling is consistent with the pronouncement in *Reeves* that "a plaintiff's prima facie case, *combined* with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated." *Reeves*, 530 U.S. at 148, 120 S. Ct. at 2109 (emphasis supplied).

Fusaro's attempt to discredit the district court's analysis because of its reliance upon *Isenbergh v. Knight-Ridder Newspaper Sales, Inc.*, 97 F.3d 436 (11th Cir. 1996), *cert. denied*, 117 S. Ct. 2511 (1997) is similarly misplaced. The district court cited to *Isenbergh* not for the principle that the plaintiff must come forward with additional evidence of discrimination to avoid summary judgment, but rather for the proposition that the plaintiff must present "significantly probative" evidence of pretext to avoid summary judgment. App. C, p. 28a. This ruling is consistent with the Court's observation in *Reeves* that a "weak issue of fact" as to pretext does not necessarily entitle a plaintiff to get to the jury. *Reeves*, 530 U.S. at 148, 120 S. Ct. at 2109.

Fusaro's remaining criticisms of the district court's ruling are equally without merit. Fusaro challenges the district court's conclusion that Fusaro was obligated to come forward with evidence that "call[ed] into question the veracity of defendant's ultimate justification itself." The district court's ruling amounts to little more than a paraphrase of the principle in *Reeves* that the plaintiff must come forward with evidence which would allow a jury to find that the employer's proffered justification for its actions was pretextual. If Fusaro's evidence did nothing more that

create issues of facts as to certain peripheral issues, but did not challenge the validity of the substantive reasons proffered by the Authority, then that evidence was insufficient to allow Fusaro to survive summary judgment. In similar fashion, the district court's conclusion that Fusaro needed not only to establish a *prima facie* case, but *also* present evidence of pretext is perfectly consistent with *Reeves*. *Reeves*, *supra* ("[A] plaintiff's prima facie case, *combined* with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated.")[5]

Even if it were the function of this Court on a petition for writ of certiorari to review the analysis of the district court below, the petition should still be denied because the district court's analysis in this instance was consistent with the subsequent pronouncements of this Court in *Reeves*.

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5. Fusaro takes exception to the district court's observation that he offered no additional evidence "to show that the Authority's reason for terminating his employment was simply a pretext for intentional discrimination." However, that was precisely the observation made by this Court in *Reeves*: "[T]he plaintiff — once the employer produces sufficient evidence to support a nondiscriminatory explanation for its decision — must be afforded the 'opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination.' " *Reeves*, 530 U.S. at 143, 120 S. Ct. at 2106, *citing to Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253, 101 S. Ct. 1089 (1981).

## CONCLUSION

*Fusaro* has failed to articulate a recognized basis for the Court to exercise its discretionary power to review the decision below by writ of certiorari. While Fusaro's petition makes repeated references to alleged conflicts created by the district court's analysis in this case, there is no indication that the Eleventh Circuit's decision or analysis conflicts with a precedent of this Court. Moreover, Fusaro's criticisms of the district court's analysis are unfounded since the district court correctly concluded that Fusaro was required to establish a *prima facie* case of discrimination as well as come forward with evidence that the Authority's proffered reasons for terminating his employment were pretextual. In actuality, the facts admitted by Fusaro regarding his performance and misconduct leave little room for doubt that both the district court and the Eleventh Circuit correctly concluded that summary judgment was appropriate. Under these facts, the Authority would respectfully request that the Court deny Fusaro's petition for writ of certiorari.

Respectfully submitted,

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